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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

FMC CORPORATION, Plaintiff, vs. SHOSHONE-BANNOCK TRIBES, Defendant.	Case No. 4:14-cv-489-CWD **MEMORANDUM OF FMC CORPORATION IN SUPPORT OF MOTION TO DENY ENFORCEMENT FOR FAILURE OF DUE PROCESS**

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This case asks whether the Shoshone-Bannock Tribal Court of Appeals (the "Appellate Court") provided due process to FMC Corporation ("FMC"), a United States citizen and nonmember of the Shoshone-Bannock Tribes ("Tribes"), in Tribal proceedings that resulted in an Appellate Court judgment requiring FMC to pay the Tribes' Fort Hall Business Council $1.5 million per year from 2015 into eternity, plus the amount of $20,519,381.41. May 16, 2014 Judg. ("Judgment"), 008555; SOF 117.

This question must be answered in relation to a system in which: (a) FMC's opponent maintains ultimate control over constitutionally "subordinate" courts and judges; (b) FMC did not have the protection of the Bill of Rights or any other constitutional limitations on government; (c) the Tribal government enjoys complete immunity from liability arising from any abuse of these unlimited powers: (d) FMC could have no part in tribal government, and could not "give[] the consent of the governed that provides a basis for power within our constitutional system," *Duro v. Reina*, 495 U.S. 676, 694 (1990): and (e) FMC has no means of seeking redress through Article III courts in which both tribal members and nonmembers are citizen participants. *Nevada v. Hicks*, 533 U.S. 353, 385 (2001) (Souter, J. concurring).

With no system to provide due process, it can be no surprise that FMC was denied due process: (1) the applicable laws were unknowable and changed at the whim of the Tribe; (2) the Tribes dumped one Judge when he decided against the Tribes; (3) the Tribes changed procedures mid-stream in order to avoid the judge they fired; (4) even after other judges publicly admitted that they were advocating for the Tribes, their decisions still determined the outcome; (5) after key evidence was discovered to have been withheld by the Tribes' counsel, the tribal courts still ignored it; and (6) the tribal courts selectively relied on state law when it helped the Tribes, and ignored state law when it did not help the Tribes.

There was never a realistic possibility of a fair proceeding for FMC in courts controlled by FMC's opponent. To pretend otherwise is to completely abandon our nation's core values of limited government of the people. Comity does not allow recognition of this Judgment.

I. THE QUESTION OF DUE PROCESS UNDER *WILSON V. MARCHINGTON* MUST BE ANSWERED ON A *DE NOVO* BASIS.

A district court does not have "discretion to give comity" to a tribal court judgment "if the tribal court proceedings deprived" a non-member of due process. *Bird v. Glacier Elec. Co-op.*, 255 F.3d 1136, 1152 (9th Cir. 2001). A district court has no discretion to recognize a judgment that is not based on due process, which will be reviewed *de novo*. *Id.* at 1140-41.

A. The Ninth Circuit Case of *Wilson v. Marchington* Requires the District Court to Determine Whether the FMC Was Afforded Due Process.

The case of *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), established the legal criteria for recognition of tribal judgments:

> In synthesizing the traditional elements of comity with the special requirements of Indian law, we conclude that, as a general principle, federal courts should recognize and enforce tribal judgments. However, federal courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) ***the defendant was not afforded due process of law***.
>
> In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances: (1) the judgment was obtained by fraud; ***(2) the judgment conflicts with another final judgment that is entitled to recognition***; (3) the judgment is inconsistent with the parties' contractual choice of forum; or (4) recognition of the judgment, or the cause of action upon which it is based, ***is against the public policy of the United States*** or the forum state in which recognition of the judgment is sought.

Wilson, 127 F.3d at 810 (emphasis added). Under *Wilson*, tribal court judgments are not enforced if the defendant was not provided due process of law. 127 F.3d at 810, 811. A claim of lack of due process is presented as a defense to enforcement of a foreign judgment after the party seeking enforcement of the judgment makes a *prima facie* showing that there was subject matter

jurisdiction, personal jurisdiction, and that there were regular proceedings conducted according to a normal course of civilized jurisprudence. *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 905 (9th Cir. 2002); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1409 (9th Cir. 1995). The Ninth Circuit explained:

> Due process, as that term is employed in comity, encompasses most of the *Hilton* factors, namely that there has been opportunity for ***a full and fair trial before an impartial tribunal*** that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is ***no showing of prejudice in the tribal court*** or in the system of governing laws. Further, as the Restatement (Third) noted, ***evidence "that the judiciary was dominated by the political branches of government or by an opposing litigant***, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition." Restatement (Third) Section 482 cmt. b.

Wilson, 127 F.3d at 811 (emphasis added).

B. Review of a Tribal Court Judgment for Due Process Is Pursued Under a *De Novo* Standard of Review.

The issue of whether the Tribes provided FMC due process must be considered with a *de novo* standard of review. In *Bird*, the Ninth Circuit explained that "the district court here had no discretion to recognize" a tribal court judgment not based on due process, and that the question of due process must be reviewed *de novo*[1]. *Bird,* 255 F.3d at 1140-41; *see Burrell v. Armijo*, 456 F.3d 1159, 1167 (10th Cir. 2006); *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996). A *de novo* standard of review applies to the question of whether another court provided due process, because presumably that other court would always find that it provided due process. Federal courts address all types of claims of due process violations with a *de novo* standard of

[1] The Ninth Circuit published this standard in its online publication of its Standards of Review: "**32. Tribal Courts**. . . . Whether a denial of due process precludes a district court's grant of comity to the trial court's judgment presents questions of law reviewed *de novo*. *See Bird v. Glacier Elect. Coop., Inc.*, 255 F.3d 1136, 1140-41 (9th Cir. 2001)." Ninth Circuit Standards of Review, "Tribal Courts" (http://www.ca9.uscourts.gov).

review. Ninth Circuit Standards of Review (http://www.ca9.uscourts.gov). *De novo* review means that the reviewing court views the case from the same position as the reviewed court. *Id.* With *de novo* review, the reviewing court must consider the matter anew, as if there had previously been no decision rendered. *Id.* Review under a *de novo* standard is "independent," or "plenary." "When de novo review is compelled, no form of appellate deference is acceptable." *Id.*

C. The Only Question Presented Is Whether the Judgment In its Current Form is Enforceable Under the Standards Established in *Wilson v. Marchington*.

In determining whether to recognize a tribal court judgment, the federal district court is not acting as an appellate court. The federal district court has no authority to remand the case back to the tribal court, or to correct errors or revise the judgment in any way:

> Had this case been tried in federal court, our ruling might permit consideration of the possibility of a remand for a new trial. But because the case was tried in tribal court, we hold only that the tribal court judgment is not entitled to comity and may not be recognized or enforced in federal court.

Bird, 255 F.3d at 1153 n. 21; *see AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002). The question of whether to enforce the judgment turns on whether due process was provided. If the answer is negative, the district court *must deny* enforcement of the tribal court judgment.

II. THERE IS NOTHING IN THE TRIBAL COURT SYSTEM THAT PROTECTS ANY DUE PROCESS RIGHTS OF A NON-MEMBER OF THE TRIBES

A. The Judgment Suffers From All of the Concerns Regarding Tribal Courts Expressed by the United States Supreme Court.

The Tribal courts here are subordinate to the Business Council, and were asked to decide if that same Business Council should prevail over FMC. That can lead to only one result. The Supreme Court has pointed out the problems inherent in subjecting nonmembers to tribal courts:

> Tribal sovereignty, it should be remembered, is ***"a sovereignty outside the basic structure of the Constitution." The Bill of Rights does not apply to Indian tribes***. Indian courts ***"differ from traditional American courts in a number of significant respects."*** And ***non-members have no part in tribal government*** — they have no say in the laws and regulations that govern tribal territory.

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008) (emphasis added); citing *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in judgment); *Talton v. Mayes*, 163 U.S. 376, 382-385 (1896); *Nevada v. Hicks*, 533 U.S. 353 (2001) (Souter, J. concurring)).

> The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given "[t]he special nature of [Indian] tribunals," *Duro v. Reina*, 495 U.S. 676, 693 (1990), which ***differ from traditional American courts in a number of significant respects***. To start with the most obvious one, it has been understood for more than a century that ***the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes.*** *See Talton v. Mayes*, 163 U.S. 376, 382-385 (1896); F. Cohen, Handbook of Federal Indian Law 664-665 (1982 ed.) (hereinafter Cohen) ("Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes").

Hicks, 533 U.S. at 383-84 (Souter, J. concurring) (emphasis added). Justice Souter explained:

> [A] presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, ***an overriding concern that citizens who are not tribal members be "protected . . . from unwarranted intrusions on their personal liberty,"***

Hicks, 533 U.S. at 384 (emphasis added), citing *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 210 (1978). Justice Souter also listed other concerns with non-tribal members being subjected to tribal courts:

> Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in ***the independence of their judges***. Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," ***tribal law is still frequently unwritten***, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." . . . . The resulting law applicable in tribal courts is ***a complex "mix of tribal codes and federal,***

> ***state, and traditional law," . . . which would be unusually difficult for an outsider to sort out***.

Hicks, 533 U.S. at 384-85 (Souter, J. concurring) (emphasis added). Finally, Justice Souter expressed concern that tribal courts are often subordinate to the political branch:

> The result, of course, is a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that ***"[t]ribal courts are often 'subordinate to the political branches of tribal governments,'"*** *Duro*, *supra*, at 693 (quoting Cohen 334-335).

Hicks, 533 U.S. at 385 (emphasis added).

In sum, the United States Supreme Court has expressed the following concerns:

- **Outside the Structure of the Constitution**. "Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." *Plains Commerce*, 554 U.S. at 337; quoting *Lara*, 541 U.S. at 212 (Kennedy, J., concurring). The "tribes are left with broad freedom not enjoyed by any other governmental authority in this country." *Duro*, 495 U.S. at 676.

- **Lack of Consent of Governed**. "This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a basis for power within our constitutional system." *Duro*, 495 U.S. at 694; *see* Decl. Ind. ¶ 2 ("It is a fundamental belief of our republic that Governments "deriv[e] their just Powers from the Consent of the Governed."). "The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate." *Id.* at 693. "And non-members have no part in tribal government – they have no say in the laws and regulations that govern tribal territory." *Plains Commerce*, 554 U.S. at 337.

- **The Bill of Rights Does Not Apply**. "The Bill of Rights does not apply to Indian tribes." *Plains Commerce*, 554 U.S. at 337; *Duro*, 495 U.S. at 676; *Hicks*, 533 U.S. at 383 (Souter, J., concurring).

- **Indian Civil Rights Act Provides No Protection**. The Indian Civil Rights Act of 1968 provides no protection for a nonmember because there is no federal cause of action against a tribe for violation of its provisions. *Duro*, 495 U.S. at 693; *Hicks*, 533 U.S. at 384 (Souter, J., concurring); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 and n.7 (1978).

- **Tribal Courts Are Often Subordinate to Political Branches**. "Tribal courts are often 'subordinate to the political branches of tribal governments,' . . . ." *Duro*, 495 U.S. at 693; *Hicks*, 533 U.S. at 385 (Souter, J., concurring). Tribal courts differ from other American courts "in the independence of their judges." *Hicks*, 533 U.S. at 384 (Souter, J., concurring); see Decl. Ind. ¶ 12 (The Declaration of Independence

asserted that it is not acceptable for a sovereign to make "Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.").

- **Tribal Laws Are Often Unknowable**. "The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' which would be unusually difficult for an outsider to sort out." *Duro*, 495 U.S. at 384-385 (Souter, J., concurring).

- **There Is No Effective Review of Tribal Court Actions**. "It is generally accepted that there is no effective review mechanism in place to police tribal courts' decisions on matters of non-tribal law, since tribal court judgments based on state or federal law can be neither removed nor appealed to state or federal courts." *Hicks*, 533 U.S. at 385 (Souter, J., concurring). "[T]he general federal–question removal statute refers only to removal from state court." *Hicks*, 533 U.S. at 368 (Scalia, J., majority).

B. It is Not Possible for a Nonmember to Obtain Due Process in a System in Which its Opponent Chooses the Court, and in Which the Nonmember Has No Protections Against Governmental Overreach.

The Business Council will receive and spend any funds obtained through the courts. SOF 70. Under the Tribes' Constitution, the Business Council is the only branch of government and controls all functions of the Tribes, including the Tribal courts. SOF 71. FMC is not alone in asserting this truth. In an open letter published in the local news, a Tribal Court Judge not involved in this matter wrote regarding these realities:

> ***That was a hard decision to make because after being removed as a Judge by the Council the day before Thanksgiving, and finally reinstated January 16, 2015***, with no back pay, having lost all that pay, I am not in a financial position to resign my position at this time.
>
> [Indian Judges] are considered appointed officials, however, the reality is we are second class employees. . . . ***We [tribal court judges] serve at the pleasure of the Fort Hall Business Council and can be removed at their will. That is the reality of the job***.

March 19, 2015 ShoBan News (emphasis added); Apr. 22, 2015 Aff., Doc. 38., Ex. 12, Doc. 38-12; Apr. 8, 2015 FMC Br., Doc. 36, at 3.

The Tribes' Constitution establishes that "[t]he governing body of the Shoshone-Bannock Tribes of the Fort Hall Reservation shall be a council known as the Fort Hall business council."

SOF 71; TRIBAL CONST. art. III § 1. The Business Council has ultimate control over all parts of Tribal operations, including over the Tribal courts, which are politically subordinate entities to the Business Council. Every act of the Tribes, including judicial acts, is subject to the supervision and direction of the Business Council. SOF 73; TRIBAL CONST. art. III § 1; art. VI § 1(k); art. VI § 1(s). Outside of the Business Council, there are no other governing bodies provided for in the Tribes' Constitution. There is no separation of powers. There is no independent judicial system, or independent legislative body, or independent executive. SOF 71.

The Business Council has the sole power to establish and supervise Tribal courts. SOF 72; TRIBAL CONST. art. VI § 1(k). The Tribal Constitution allows the Business Council to delegate some of its powers to "subordinate boards" but only with the express reservation for the Business Council of "the right to review any action taken by virtue of such delegated power," giving the Business Council the right to review any action taken by the tribal courts. SOF 73; TRIBAL CONST. art. VI § 1(s). The Tribal courts cannot be seen as an impartial tribunal conducting a fair trial, nor can an absence of prejudice be proven, nor can it be proven that the tribal courts were free from domination by the Business Council as required by *Wilson*. 127 F.3d at 811; SOF 78.

C. *Bird* and *Burrell* Demonstrate Why the Tribal Court Judgments Cannot Be Enforced.

Since the Ninth Circuit established the comity analysis for tribal court judgments in 1997 in *Wilson*, *supra* there have been only a limited number of cases that reviewed a completed tribal court judgment. But in nearly every such case, the Ninth Circuit refused to enforce the tribal court judgment, usually because the tribal courts overreached on tribal jurisdiction.[2] In only two

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[2] *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002); *Bird v. Glacier Elec. Co-op.*, 255 F.3d 1136 (9th Cir. 2001); *Big Horn County Electric Coop. v. Adams*, 219 F.3d 944 (9th

cases was the tribal decision followed, involving significant voluntary participation by the nonmember in the tribal process, which is not present here.[3]

In the only case where due process under *Wilson* was analyzed as a defense to a completed tribal judgment, the Ninth Circuit refused to enforce the judgment. In *Bird, supra*, the Ninth Circuit denied enforcement of a verdict from a jury composed entirely of members of the Blackfeet Tribe, where the attorney for Bird made an improper closing argument. Relying on *Wilson,* the Ninth Circuit concluded that the tribal court proceedings "offended fundamental fairness and violated due process owed the Co-op," and stated that "the district court did not have discretion to give comity to the tribal court judgment" where "the tribal court proceedings deprived the Co-op of due process." *Bird,* 255 F.3d at 1152.

In *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006), the Tenth Circuit refused to enforce a tribal court judgment due in part to the "close relationship" between the tribal court and the tribal parties to the case. A nonmember had entered into a lease to farm tribally owned land, and a dispute had developed between the nonmember and the tribal government regarding this lease. The tribal government was the party opposing the nonmember, that government had a significant economic interest in the dispute, and that government controlled the tribal court. Given these facts, the Tenth Circuit refused to enforce the tribal court's judgment:

> As an initial matter, we note that ***the close relationship between the tribal court, the Pueblo, and the individual tribal officials*** causes us to carefully scrutinize the tribal court proceedings in this case.

Burrell, 456 F.3d at 1173 (emphasis added).

Cir. 2000); *Burlington N. RR. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 2000); *Cnty. of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).

[3] *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (claim by student at tribal college); *Water Wheel Camp Recreational Area v. Larance*, 642 F.3d 802 (9th Cir. 2011) (long term lease of tribal land).

III. WITH NO REASON TO PROVIDE DUE PROCESS, THE TRIBES IN THIS CASE FAILED TO PROVIDE DUE PROCESS

There is no institutional system in place to provide nonmembers due process. While the Tribes decorated the proceedings with a façade of due process, without any institutional system for due process, there was no real possibility that the system could provide due process. At the inception of the Tribal Court case, the Business Council made an attempt to give an appearance of fairness to the Tribal Court proceedings by appointing an outside attorney to act as the Tribal Court judge. SOF 80. But that approach backfired when that outside judge ruled against the Business Council, explaining that the Tribes did not have any law in place that would require FMC to pay the $1.5 million permit fee in perpetuity. SOF 83. In response to this, the Business Council appointed an Appellate Court panel with a majority who were advocates for tribes. That panel was willing to ignore that fundamental problem and overturned the Tribal Court decision. But after the majority of the panel made the mistake of publicly explaining their tribal advocacy in a publicly recorded meeting, the Business Council replaced that first panel with a second panel. SOF 94-102, 105, 113. The second panel revised the procedures midstream so as to avoid a remand to the Tribal Court judge who had ruled against the Tribes. SOF 111. And when the second panel learned that the Tribes' counsel had withheld the authoritative document that showed the Tribal Court judge was correct, the panel ignored the evidence and blamed FMC for not presenting the withheld document earlier. May 28, 2013 Order, 006626-27. The court also selectively chose state law when it supported their advocacy, and ignored state law when it contradicted their advocacy. Feb. 5, 2013 Findings 006510, 006525, 006517-19; Jul. 15, 2010 FMC Br. 004873, 004934. In short, the Tribal courts acted exactly as they would be expected to act in a system in which there is every incentive to favor one party over the other.

A. The Land Use Policy Commission and Business Council Ruled for Themselves.

The first stage of the proceeding was before the Tribes' Land Use Policy Commission ("LUPC"). Since the LUPC is a party in the case, and a subordinate agency to the Business Council, and would have a hand in disposing of any revenues obtained from a judgment against FMC, it was not surprising that the LUPC quickly ordered FMC to pay tens of millions of dollars in permit fees. SOF 64-69; Apr. 25, 2006 Findings, 000349, 000353.[4] FMC then appealed the LUPC's decision to the Business Council. SOF 74. The Business Council is the entity that would receive and dispose of any funds paid by FMC. SOF 70. The Business Council predictably found in its own favor, affirming the LUPC ruling that FMC must pay it the $1.5 million annual permit fees in 2001 and every year thereafter in perpetuity. SOF 75-76; Jul. 21, 2006 Dec. 002787; Jun. 14, 2007 Dec. 003021.

B. When the Tribal Court Ruled for FMC, the Judge Was Removed From Further Proceedings.

The only avenue for appeal of the decisions of the Business Council is to the Shoshone-Bannock Tribal Court, another body subordinate to the Business Council. The Business Council has sole power to establish the Tribal courts. TRIBAL CONST. ART. VI, § 1(k). The Business Council can rescind and restructure the Tribal courts by ordinance at any time. LAW AND ORDER CODE, ch. I § 3.2. The Business Council sets the compensation of the Tribal judges, Law and

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[4] The LUPC is not provided for in the Tribal Constitution, and has no constitutional powers separate from the Business Council. Under the Ordinance, the Business Council specifically "reserves the right to review any action taken by virtue of such delegated power." SOF 26; Ordinance § 4.A.1.b. This reservation of the right to review all actions of the LUPC is required by Article VI, § 1(s) of the Tribal Constitution. SOF 73. In addition, the budget of the LUPC is controlled by the Business Council, Ordinance, § 4.A.1.b.; and the Ordinance gives the Business Council a broad power to remove any member of the LUPC if the Council feels that the member "has failed to fulfill his or her duties." Ordinance, § 4.A.6. SOF 26. Also, the Business Council has the ultimate power to disband the LUPC at any time.

Order Code, Ch. I, § 3.7, and controls the budget of the Tribal courts. The Tribal courts have no independent means of funding their efforts. The Business Council also has the power to suspend or remove Tribal court judges. LAW AND ORDER CODE, CH. I, §§ 3.8; 3.2.

Somehow, the Business Council or its subordinates chose to have FMC's appeal heard by David Maguire, an attorney licensed by the State of Idaho. SOF 80. After examining the evidence and the law, Judge Maguire ruled that FMC was not required to obtain a Tribal special use permit for industrial activities inside an area zoned industrial because:

- Neither the Tribes' Land Use Policy Guidelines nor any amendments to the Tribes' Hazardous Waste Acts had any provision for a permitting fee of $1.5 million dollars;
- The Tribes' Constitution, Article VI§ 1(k), requires the Tribes to obtain approval by the Secretary of the Interior for any ordinance directly affecting non-members, and the Tribe failed to obtain such approval, therefore the imposition of the $1.5 million fee is void;
- There was no incorporation of FMC's so-called "Letters Agreement" into any Tribal ordinances;
- The "Letters Agreement" was not a contract between FMC and the Tribes; and
- There is no evidence that FMC agreed to pay a $1.5 million dollar fee for every year that waste remained on its property.

SOF 82-86; May 21, 2008 Opinion, 004357; Nov. 13, 2007 Opinion, 004023.

In its decision, the Business Council had argued in July 2006 that it had properly adopted the 2001 Hazardous Waste Management Act ("HWMA"), which provided the Tribes' legal basis for the fee imposed on FMC. July 21, 2006 FHBC Decision, 002787. But FMC argued to the Tribal Court in March 2008 that this law had not been approved by the Bureau of Indian Affairs ("BIA"), and was thus not duly adopted. May 6, 2013 Br., 006610, 006624-25. In response to this, the Tribes privately wrote to the BIA asking whether FMC was correct that the BIA had not approved the HWMA. Mar. 21, 2008 Tribes Br., 004205, at 004231; Apr. 4, 2008 FMC Br., 004262, at 004286. The BIA quickly responded on April 11, 2008, telling the Tribes that it had

not approved the HWMA. May 6, 2013 FMC Br., 006610, 006624-25. But rather than providing this authoritative and dispositive letter to FMC or the Tribal Court, the Tribes kept it to themselves, while continuing to represent to the Tribal Court that the BIA had given the HWMA an "unconditional approval." Apr. 15, 2008 Trans., 004305 at 004326. In spite of this, the Tribal Court was not fooled, and found based on other evidence that the HWMA had not been approved by the BIA. May 21, 2008 Op., 4357, 4373.

Subsequent to these decisions, somehow the case was never sent back to the Tribal Court or Judge Maguire, as will be shown further below. SOF 87.

C. The First Panel of the Tribal Court of Appeals Explicitly Pronounced its Intention to "Protect the Tribe."

In May 2008, the Tribes appealed Judge Maguire's decision to the Tribal Appellate Court ("Appellate Court"). The case was then before the Appellate Court for ***six (6) years***. The makeup of the Appellate Court was Fred Gabourie (a member of a tribe) as Chief Judge, and Mary Pearson (a member of a tribe) and Cathy Silak as Associate Judges. Oct. 28, 2009 Not., 004410; SOF 92. The case was briefed in 2010, and was under consideration until May and June 2012, when the Appellate Court finally issued its decision against FMC. SOF 93; May 8, 2012 Findings, 006165; June 26, 2012 Am. Findings, 006262.

While the case was still under consideration, two of the members of the panel (Judge Gabourie and Judge Pearson) made a public presentation at the University of Idaho on March 23, 2012.[5] SOF 94. At this videotaped public seminar, Judges Gabourie and Pearson explained that

[5] The seminar was entitled "Tribal Courts: Jurisdiction and Best Practices," and the presentation by Judges Gabourie and Pearson was titled, "The Importance of Tribal Appellate Courts." The seminar was organized by the University of Idaho College of Law. SOF 94. On May 18, 2012, FMC made a request for the videotape of the Judges' public remarks. SOF 105. However, this request was denied. *Id.* FMC was forced to file an action under the Idaho Public Records Act against the University of Idaho seeking the release of the videotape. *Id.* On January 3, 2013, an

it was important for Tribes to obtain as much jurisdiction and sovereignty for Indian tribes as possible, and explained how tribal appellate judges should issue decisions to achieve this goal for tribes. SOF 95. They criticized the principal United States Supreme Court decisions regarding tribal jurisdiction, stating that *Montana* "has just been murderous to Indian tribes." SOF 96.

Chief Judge Gabourie explained how tribal appellate judges should help evade the Supreme Court precedents, explaining that "you better have a good appellate court decision to get around that [*Montana v. United States*, 450 U.S. 544 (1981)]." SOF 97. Judges Gabourie and Pearson also criticized *Nevada v. Hicks*, 533 U.S. 353 (2001), and *South Dakota v. Bourland*, 508 U.S. 679 (1993); SOF 98. Judge Gabourie said: "I think Judge Ginsburg made a mistake" in her opinion for the unanimous court in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); SOF 98. The judges took the position that the Supreme Court decisions in *Bourland* and *Strate* were "bad decisions." SOF 98. They stated that the way to avoid "bad decisions" against tribes was for the tribal appellate courts to advocate the tribe's position in the decision, so as to make a better record that would more likely be recognized by the federal courts. SOF 97, 99. Judges Gabourie's and Pearson's presentation made it clear that they were anything but fair and impartial. Judge Gabourie told the audience that the tribal "appellate courts have got to step in" and "be sure to protect the tribe." SOF 99.

Judges Gabourie and Pearson also made specific comments about mining and manufacturing companies. At that point, the Appellate Court had not heard any evidence regarding the environmental investigation of the FMC Pocatello Site. But Judges Gabourie and Pearson made it clear that they had decided they did not need any evidence on these points, as Judge Gabourie stated that he already knew the water was polluted, even without proof:

Idaho state court issued an Order Compelling Production of Public Document, ordering the University of Idaho to release the videotapes. *Id.*

> You know, there's one area, too, there are tribes that have had mining and other operations going on, on the reservation, you know, and then the mining company or whatever, manufacturing company, disappears. . . .
>
> And you sit as a – as an appellate court justice, and you're starting to read the cases that come down from the tribal court. And you're saying to yourself, you know, ***We know that the – there's pollution**, that the food that they're eating is polluted, the water's polluted, but **nobody proved it**.*

SOF 100. Judge Pearson also made it clear that she had made up her mind in the same way, judging that FMC had dirtied the groundwater and then gone out of business:

> [Y]ou know where – ***companies come on the reservations and do business for X number of years and they dirty up your groundwater and your other things, and they go out of business. And they leave you just sitting.*** And you need to know what you can do as you're sitting as a judge with those cases coming toward you.

SOF 101[6] The pre-judgments made by Judges Gabourie and Pearson were wrong. FMC has never abandoned its Site or its environmental responsibilities. SOF 5-21, 102. Rather, FMC has diligently performed its obligations under the RCRA[7] Consent Decree, and FMC has diligently pursued the environmental investigations and proposed the most advanced remedial actions selected by EPA under CERCLA.[8] SOF 5-21, 128-136, 142-183. FMC has fully funded such efforts, including costs for oversight by EPA, the State of Idaho, *and the Tribes*. FMC also fulfills EPA requirements for financial assurance for this by reserving the money required to fund such efforts into the future.

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[6] This panel expressed these same pre-judgments of facts in its January 2013 Opinion. Jan. 14, 2013 Findings, 006464. In particular, the panel repeated Judge Pearson's opinion that the FMC site "would have been abandoned and left to the Tribes to clean-up, had the government not stepped in." Jan. 14, 2013, 006477. There was no evidence for this point at the time, nor is there evidence for this point in the record of the subsequent trial. Similarly, the panel found that the Tribes' litigation of these issues would protect the health of the tribal members, even though there has never been any evidence that this litigation will protect any health risks in any way whatsoever. Jan. 14, 2013 Findings, 006480, 006470, 006477.

[7] The Resource Conservation and Recovery Act.

[8] The Comprehensive Environmental Response, Compensation and Liability Act.

The decisions of the Appellate Court also show how it selectively applied Idaho law when that law benefited the Tribes, but ignored Idaho law when it disfavored the Tribes. The Court ruled that "Tribal Law and Custom do not apply to this case," and that it would follow Idaho state law as the rules of decision, and applied those rules in order to award of attorney fees against FMC. Feb. 5, 2013 Findings, 006510, at 006525 & 006517-19. However, Idaho law also holds that a contract indefinite as to term is terminable at will by either party upon reasonable notice. Jul. 15, 2010 FMC Br., 004873, at 004934. Idaho contract law does not generally allow perpetual contracts that have no ending. *Id.* 4873, at 4935; *Barton v. State*, 104 Idaho 338, 340, 659 P.2d 92, 94 (1983). This law would bar any judgment against FMC, because the contract alleged had no duration term and FMC terminated the contract. SOF 49. But the Appellate Court ignored that Idaho law, while simultaneously applying Idaho law when it helped the Tribes. Jun. 14, 2012 Op., 6262 at 6305.

The first panel remanded the matter to the Tribal Court to consider additional evidence relating to the second *Montana* exception. SOF 109; June 26, 2012 Dec., 6262 *6323. However, the Appellate Court later revoked this remand and ordered that the Appellate Court would hear the evidence relating to the second *Montana* exception. SOF 111, 115; May 28, 2013 Order, 006626-28.

D. The Decision for the Second Panel of Tribal Appellate Court Had Been Reached Long Before the Trial Was Held.

After the videotapes of their public presentation were released, the judges of the first panel were replaced by a second panel, with no indication of the process by which they were appointed. SOF 113. These judges ultimately were Judge Peter McDermott, Judge Vern E. Herzog and Judge John Traylor. *Id.* Judge Traylor was a former employee of the Tribes. SOF 113. In spite of the evidence of the partiality of the first panel, the second panel did not

reconsider the first panel's decision. The new panel kept the Decision in full force and effect. SOF 114.

The Appellate Court's decision to hear evidence on the second *Montana* exception was an abrupt change in procedure at the end of the proceeding, and violated due process. ***First***, the matter was a review of the LUPC's administrative action. The review should have been limited to the LUPC record. Holding a new evidentiary hearing ignored that this was a review of LUPC's action. ***Second***, the Appellate Court had already determined jurisdiction over FMC under the first *Montana* exception. After having found jurisdiction on one basis, a proceeding on the second exception was unnecessary, unless the Court had already pre-determined to find jurisdiction on a separate basis. ***Third***, the majority of the first panel had already stated that they believed FMC had polluted the groundwater and the food of the Tribes, and had put these conclusions into their Order, before hearing any facts on the issue. SOF 112; Jan. 14, 2013 Findings, 6464, 6477, 6480, 6470. ***Fourth***, making this initial determination in the final court of appeal, denied FMC any "access to appeal or review," which is an element of due process required in *Wilson v. Marchington*. *Wilson*, 127 F.3d at 811; *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ("Restatement") § 482 cmt. b (1987); *see Burrell*, 456 F.3d at 1159, 1173 ("[W]e are troubled by the lack of a tribal appellate court to review the second tribal judge's decision.").

The second panel also decided to ignore that the Tribes had withheld key evidence supporting the Tribal Court decision. On appeal, the Tribes argued to the Tribal Court of Appeals that the BIA had approved the HWMA. Apr. 15, 2010 Tribes Br., 004469, at 004547-48; Tribes' Findings, 006065 at 006093-94. In May 2012, the Tribal Court of Appeals issued an opinion agreeing with the Tribes on this point, without the benefit of the evidence the Tribes

possessed. *Compare* Feb. 10, 2012 Findings, 006065 at 006093-94, *to* May 8, 2012 Op., 006165, at 006194-95. As explained above, four years earlier, while the case was before the Tribal Court, the Tribes had received the BIA's analysis that it had not approved the ordinance that is the basis for the Tribes' permit, as required by the Tribes' Constitution. May 6, 2013 FMC Br., 006624. The Tribes had kept this letter to themselves for four years. Jun. 22, 2012 FMC Br. 006253, 006255. When FMC finally obtained this evidence, FMC presented it to the Appellate Court, explaining that the Tribes had kept this key evidence showing that the legal basis for the permit fee did not exist. June 22, 2012 FMC Br., 006253, at 006255-56; May 6, 2013 Br., 006610 at 006614. But instead of ruling that this evidence supported the Tribal Court opinion that there was no statutory basis for the fee, the Appellate Court blamed FMC, rather than the Tribes, for not "timely" providing the document that had been withheld by the Tribes. May 28, 2013 Order, 006626, at 006627.

E. Conclusion: No Due Process Will Be Provided In a System Is Not Designed to Require Due Process.

The Tribes seek to convince the Court that due process was provided by a system that had no real incentives to provide due process. That will not work, and did not work. Instead, the law was unknowable, allowing the Tribes to say a law was enacted when it had not been. *See Duro*, 495 U.S. at 384-385 (Souter, J., concurring). When the Tribes kept key evidence that the law had not been enacted, the Tribal courts blamed FMC for delay in providing the document that the Tribes had concealed. The Tribal courts applied state law when it favored the Tribes, and ignored state law when it undermined the Tribes' entire claim. The Tribal courts abruptly changed procedure in order to prejudice FMC. These were not courts, but advocacy panels designed to support the Tribes, funded from the same funds as the Tribes' counsel.

IV. THE DISTRICT COURT ERRONEOUSLY BARRED DISCOVERY REGARDING WHETHER THE TRIBAL COURT SYSTEM PROVIDED DUE PROCESS TO A NONMEMBER OPPOSING THE TRIBAL GOVERNMENT.

When a party brings a foreign judgment to a forum court (the District Court) to be enforced in the forum's jurisdiction, the forum court must consider whether the foreign court (the Tribal Appellate Court) had jurisdiction, and whether the foreign court provided due process to the defendant. *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). Due process issues are not required to be presented to the foreign court, which would presumably always find that its process was fair and that its judgments should be enforced elsewhere. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995). Moreover, questions of due process are always reviewed *de novo* by the forum court. *See* Section I above.

FMC sought to conduct discovery in relation to the due process questions found in Section IV.C. of its Amended Complaint. Jan. 19, 2015 Am. Cplt., Doc. 10; Mar. 20, 2015 FMC Lit. Plan, Doc. 30; Apr. 8, 2015 FMC Br., Doc. 36. This would have allowed discovery on questions such as how Judge Maguire was apparently fired by the Tribes, what ex parte communications there were between the Tribes and Judge Maguire or the other judges, whether the Tribes withheld payment from Judge Maguire, and how it was that the remand of the second *Montana* exception issue (itself improper) was not returned to Judge Maguire and the Tribal Court. But, in its November 9, 2015 Memorandum Decision and Order, this Court ruled that FMC was required to litigate the question of the partiality of the Tribal courts to the Tribal courts themselves, and that FMC's failure to do so was a waiver of the argument. Nov. 9, 2015 Mem. Dec., at 4. The Court prevented FMC from seeking any discovery on these issues. This clear error must be reversed.

A. The District Court Erred by Failing to Apply the *Wilson v. Marchington* Principles to this Question.

In *Wilson*, the Ninth Circuit explained that a tribal judgment must be tested for due process, just as a foreign country judgment would be:

> A federal court must also reject a tribal judgment if the defendant was not afforded due process of law. "It has long been the law of the United States that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the basics of due process." *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 519, 133 L. Ed. 2d 427 (1995). ***The guarantees of due process are vital to our system of democracy. We demand that foreign nations afford United States citizens due process of law before recognizing foreign judgments; we must ask no less of Native American tribes***.

127 F.3d at 811. In holding that the forum court must analyze whether due process was provided by the foreign court, the Ninth Circuit relied on *Bank Melli Iran,* 58 F.3d 1406. In that case, several Iranian banks had obtained $32 million in judgments against Shams Pahlavi, the sister of the former Shah of Iran, from post-revolutionary tribunals in Iran following the overthrow of the Shah. Shams Pahlavi had not made any appearance before those tribunals. The Iranian banks asked the federal courts in California to enforce these judgments. After considering evidence regarding the Iranian tribunals,[9] the Ninth Circuit denied enforcement. This ruling was based on a showing by Shams Pahlavi that she could not "receive a trial in Iran that would be characterized by a 'system of jurisprudence likely to secure an impartial administration of justice.'" 127 F.3d at 1413, citing *Hilton v. Guyot*, 159 U.S. 113, 202 (1895).

This Court's holding that FMC was required to litigate the due process issue in the Tribal courts is the legal equivalent of requiring Shams Pahlavi to argue to the revolutionary Iranian tribunals that they would not provide her a fair system of justice. The Ninth Circuit imposed no

[9] The district court considered reports issued regarding Iranian courts, the declaration of an expert, and materials obtained from the State Department at the request of the federal district court. 127 F.3d at 1411-1412.

such requirement. The *Pahlavi* and *Marchington* requirement that the foreign court provide due process would be wiped away if the foreign court was allowed to decide whether it provided due process. There is no authority for the Court's rule on this point.

B. The Legal Rule Followed by the District Court Has No Precedential Support in Tribal Law Cases.

This Court barred FMC from conducting discovery on its due process claims found in Section IV.C. of the First Amended Complaint. This Court recognized that there is no legal precedent for this novel legal rule. The District Court's decision relied entirely on the two cases of *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The Supreme Court has explained that these cases relate *only* to jurisdiction, and are *only* a "prudential exhaustion rule," deferring to tribal courts 'to explain to the parties the precise basis ***for accepting [or rejecting] jurisdiction***.'"[10] *Strate*, 520 U.S. at 450, 451 (emphasis added). Even though these cases apply only to exhaustion of jurisdiction questions, the District Court decided to extend these two cases to due process questions. Mem. Dec. at 4. The Court offered no authority for this extension.

Also, this Court's extension of exhaustion to due process issues did not exist as of the time of these Tribal court proceedings. This Court prejudiced FMC by applying this new rule retroactively. FMC could not reasonably have foreseen while in the Tribal courts that this Court would not follow the law established by *Wilson* and the Ninth and Tenth circuits, but would forge its own rule requiring that due process claims be argued to the Appellate Court.

[10] Both *Iowa Mutual* and *National Farmers* are cases in which the defendants had not exhausted tribal remedies before approaching the federal courts. Neither deals with whether an exhausted tribal court judgment will be enforced. The Supreme Court has explained: "*National Farmers* and *Iowa Mutual* . . . are not at odds with, and do not displace, *Montana*. Both decisions describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their ***jurisdiction***; neither establishes tribal-court adjudicatory authority, even over the lawsuits involved in those cases." *Strate*, 520 U.S. at 448 (emphasis added).

C. The District Court's Rule Violates Ninth and Tenth Circuit Precedent.

Besides being a novel *ex post facto* rule, the District Court's decision contradicts Ninth and Tenth Circuit authority on this point. The Tenth Circuit squarely addressed and flatly rejected the rule that the District Court adopted. In *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006), the tribal court had entered judgment in favor of its tribal government, against an outsider who had been required to find justice in the tribal courts for a dispute between the outsider and the tribal government. *Burrell*, 456 F.3d at 1172. The Tenth Circuit held that the tribal court judgment was not entitled to recognition. *Id.* The District Court for the District of New Mexico made exactly the same mistake as the Court made here, relying on the same authority:

> The district court, however, ruled that a federal court's authority to re-adjudicate issues resolved in tribal court because of a due process failure was contrary to the Supreme Court's decisions in *Iowa Mutual* and *National Farmers*.

456 F.3d at 1171. The Tenth Circuit ruled that this extension was error:

> We disagree with the district court's conclusion that the Burrells could not challenge the tribal court's judgment based on due process considerations. ***The Supreme Court's decisions in* Iowa Mutual *and* National Farmers *do not address due process***; rather, they hold that principles of comity require a federal court to give a tribal court the first opportunity to determine its own ***jurisdiction***, subject to later review by a federal court. . . .

456 F.3d at 1171 (emphasis added). This Court's rule would split with the Tenth Circuit.

The Ninth Circuit has also rejected the District Court's proposed new rule. The Tenth Circuit rule is based on *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), which explained that comity was an exception to any restriction to the tribal court record:

> ***Unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason***, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court.
>
> . . . [T]he rule that federal courts may not re-adjudicate questions – whether of federal, state or tribal law – already resolved in tribal court ***absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason***.

295 F.3d at 903-04 (emphasis added). Comity questions are an exception to any rule against re-adjudicating questions decided at the tribal court.

In *Bird*, the Ninth Circuit refused to enforce a tribal court judgment that was based on an improper closing argument. Using a *de novo* standard of review, the Ninth Circuit did not consider the opinions of the Blackfeet tribal courts, and refused enforcement, even though "[t]he Co-op did not object to this" improper argument. *Bird,* 255 F.3d at 1140. The closing argument so offended fundamental fairness that the Constitution's guarantee of due process[11] was violated, even though the defendant had not raised the issue at the trial court. *Bird*, 255 F.3d at 1152. To come to this conclusion, the Ninth Circuit explained that it considered due process violations *de novo*:

> However, we review ***de novo*** claims of due process violations. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 780 (9th Cir. 1996). ***If the tribal court violated due process, then the district court here had no discretion to recognize the tribal court judgment***. *See Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997). Further, de novo review is required when reviewing a district court's summary judgment. . . . For these reasons, we review ***de novo*** whether the alleged due process violations precluded the district court's grant of comity here to the tribal court judgment.

Bird, 255 F.3d at 1140-41 (emphasis added). *Bird* undermines this Court's rule. If exhaustion required Glacier Electric to "give the tribal court an opportunity to cure the problem," the Ninth Circuit would have ruled otherwise, because Glacier Electric did nothing to preserve its objection. Under *AT&T* and *Burrell* and *Bird*, comity factors are addressed *de novo* by the

[11] It also violates the United States Constitution to assign the consideration of due process issues to the originating court. Even in those cases where Congress has been allowed to vest adjudicatory rights to non-Article III tribunals, Congress has not been allowed to deprive the Article III courts of jurisdiction over the factual determinations related to constitutional rights. *Crowell v. Benson*, 285 U.S. 22, 52 S. Ct. 285 (1932); *Ng Fung Ho v. White*, 259 U.S. 276, 285, 42 S.Ct. 492, 495 (1922). In *Crowell*, the Supreme Court stated: "We think that ***the essential independence of the exercise of the judicial power of the United States, in the enforcement of constitutional rights requires that the federal court should determine such an issue upon its own record and the facts elicited before it.***" *Id.* (emphasis added).

federal court as part of a comity analysis, after the tribal court judgment is issued. The rule that due process issues must be addressed in tribal court is clear error.[12]

V. THE JUDGMENT SHOULD NOT BE ENFORCED BASED ON THE DISCRETIONARY FACTORS PROVIDED IN *WILSON V. MARCHINGTON*.

A federal court may decline to recognize and enforce a tribal court judgment on equitable grounds, including if the judgment conflicts with another final judgment that is entitled to recognition. *Wilson*, 127 F.3d at 810. A federal court may also decline to enforce a tribal court judgment if recognition of the judgment is contrary to the public policy of the United States. *Wilson*, 127 F.3d at 810. The Court should exercise this discretion in this case, because this Judgment is another effort to overturn the policy judgments of the EPA.

The Tribes have long sought to hijack the role of EPA as the decision-maker for the FMC Site, because the Tribes seek their remedy of removal of the wastes rather than the EPA's remedy of storing the wastes in place. SOF 11, 190-195. The Tribes challenged the RCRA storage decision by the EPA, and that challenge failed both before this Court and the Ninth Circuit. *United States v. FMC Corp.*, 229 F.3d 1161 (9th Cir. 2000) (unpublished opinion); July 13, 1999 Order, 716; SOF 9-14. This Court held that the RCRA Consent Decree that directs the storage of the wastes in place "is fair, reasonable, in the public interest, and fulfills the United States' trust responsibilities to" the Tribes. SOF 12; Jul. 13, 1999 Order, 716. This Court wrote

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[12] This Court's ruling is also contrary to the applicable standard of review. The question of whether due process was provided in another court is always a question decided *de novo*. With *de novo* review, the reviewing court must consider as if there had previously been no decision rendered. Ninth Circuit Standards of Review. This means that the question of whether due process was provided should be independent of whether the reviewed court believed it provided due process. Here, the Court required exhaustion so that the Tribal court could "provide its expertise for review by the federal district court." Nov. 10, 2015 Mem. Dec., Doc. 43, at 4. This contradicts a *de novo* standard of review where "no form of appellate deference is acceptable." Ninth Circuit Standards, *quoting Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 971 (9th Cir. 2003).

that the United States' trust responsibilities "do not allow the Tribes to prescribe the environmental-remediation measures the United States should pursue." SOF 12; Jul. 13, 1999 Order, 000717. The Court also ruled that it was "convinced that the capping requirements are adequately environmentally protective" and that there was no basis to conclude "that capping allows an unreasonable health risk to go unchecked." SOF 12; Jul. 13, 1999 Order, 000717-18. The Tribes tried again to supplant the EPA when they sought to enforce the RCRA Consent Decree as a party, but that attempt was also rejected by the Ninth Circuit. *United States v. FMC Corp.*, 531 F.3d 813 (9th Cir. 2008). The Tribes cannot now attack the same in-place storage under RCRA that was already approved by the EPA and this Court and the Ninth Circuit.[13] For these reasons, the assertion of jurisdiction over the FMC Site by the Tribes would violate the public policy of the United States, and be contrary to the judgments issued by the EPA.

VI. THE PENAL JUDGMENT RULE BARS ENFORCEMENT OF THE TRIBAL COURT JUDGMENT.

The extraterritorial enforcement of this type of penal judgment has long been prohibited under the penal law rule. The penal law rule refuses to enforce judgments that award funds to a local government issued by the local courts in favor of that local government. No jurisdiction has the power to have its penal judgments enforced outside of its own jurisdiction.

A. The Penal Law Rule Bars the Enforcement of Judgments for the Collection of Fines or Penalties.

As part of comity doctrine, courts in the United States do not recognize or enforce judgments for the collection of fines or penalties rendered by the courts of other states. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES

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[13] While the Tribes' special use permit requires only the payment of money, it is reasonable to believe that the Tribes would seek to impose environmental requirements on FMC if they were awarded jurisdiction.

(“Restatement”) § 483 (1987); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1219-20 (9th Cir. 2006); *Nelson v. George*, 399 U.S. 224, 229 (1970). This is true even when the full faith and credit clause requires one state to recognize the judgments of another state. *City of Oakland v. Desert Outdoor Advertising, Inc.*, 267 P.3d 48, 50-51 (Nev. 2011).

The penal law rule was first established by the United States Supreme Court in the case of *The Antelope*, 23 U.S. (10 Wheat.) 66, 6 L.Ed. 268 (1825), when Chief Justice John Marshall explained that “[t]he Courts of no country execute the penal laws of another.” *Antelope*, 23 U.S. at 123; *see United States v. Federative Republic of Brazil*, 748 F.3d 86, 91 (2d Cir. 2014). Chief Justice Marshall explained that no country “can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.” *Antelope*, 23 U.S. at 122.

The Supreme Court has repeatedly confirmed this rule over the last two centuries. In *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 290 (1888), *overruled in part on other grounds by Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 278 (1935), the Supreme Court stated:

> ***By the law of England and of the United States, the penal laws of a country do not reach beyond its own territory***, except when extended by express treaty or statute to offences committed abroad by its own citizens; and ***they must be administered in its own courts only, and cannot be enforced by the courts of another country***.

127 U.S. at 289-290 (emphasis added); *see Huntington v. Attrill*, 146 U.S. 657, 666 (1892); *Oklahoma ex rel. West v. Gulf, Colo. & Santa Fe Ry. Co.*, 220 U.S. 290, 299-300 (1911); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-414 (1964); *Pasquantino v. United States*, 544 U.S. 349, 360-61 (2005); *see United States v. Federative Republic of Brazil*, 748 F.3d 86, 91 (2d Cir. 2014).

The Ninth Circuit also follows this principle, based on Section 483 of the Restatement. Restatement § 483. In *Yahoo! v. La Ligue Contre Le Racisme*, 433 F.3d 1199 (9th Cir. 2006), the Ninth Circuit wrote that a French judgment would likely not be enforced because "the common law rule against the enforcement of penal judgments is venerable and widely-recognized." 433 F.3d at 1219, citing *Huntington v. Attrill*, 146 U.S. 657, 673-74 (1892).

This well-established comity principle applies to the Judgment of the Appellate Court, because "the recognition and enforcement of tribal judgments in federal court must inevitably rest on the principles of comity." *Wilson*, 127 F.3d at 809. While *Wilson* relied on Section 482 of the Restatement (Third) of Foreign Relations Law of the United States for its analysis, the Ninth Circuit relied on its companion section, Section 483, in *Yahoo!,* 433 F.3d at 1219. Section 483 provides as follows:

> Courts in the United States are not required to recognize or to enforce judgments for ***the collection of <u>taxes, fines, or penalties</u> rendered by the courts of other states***.

Restatement § 483. The Ninth Circuit explained:

> This is consistent with the Restatement's declaration that "[c]ourts in the United States are not required . . . to enforce judgments [from foreign countries] for the collection of . . . fines or other penalties." ***<u>Restatement § 483</u>***; *see also* 30 Am.Jur.2d Execution and Enforcement of Judgments § 846 (2004) ("Courts in the United States will not recognize or enforce a penal judgment rendered in another nation.").

Yahoo!, Inc., 433 F.3d at 1219. The Ninth Circuit has adopted both Section 482 and 483 of the Restatement, and both must be followed here. *Wilson*, 127 F.3d at 809; *Yahoo!, Inc.*, 433 F.3d at 1219.

B. The Judgment in this Case is a Penal Judgment that Cannot Be Enforced Under the Penal Law Rule.

Enforcement of this Judgment outside of the Fort Hall Reservation is prohibited because it awards funds to the Tribal public, rather than to individuals. A penal law is one where the wrong sought to be redressed is a wrong to the public, rather than to an individual. The Ninth Circuit rule is that a penal law is a law that punishes an offense against the state, rather than providing a private remedy to a person injured, explaining that the determination

> is not by what name the statute [on which the judgment is based] is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a ***punishment of an offense against the public***, ***or*** ***a grant of a civil right to a private person***.

Yahoo!, Inc., 433 F.3d at 1219 (emphasis added); *see also Banco Nacional*, 376 U.S. at 413 n. 15 ("one which seeks to redress a public rather than a private wrong"). The Supreme Court has written that the penal law rule applies "to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." *Wisconsin*, 127 U.S. at 290 (emphasis added). The Supreme Court explained further that a penal judgment is one where "The cause of action was not any private injury, but solely the offence committed against the State by violating her law" and where "[t]he prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State." *Wisconsin*, 127 U.S. at 299.

Based on these rules, the Judgment in this case is based on a penal law, or a law which punishes an offense against the public or the Tribes as a whole. The Judgment is issued in favor of the Tribes' government rather than to any individual. The Judgment is based on the Tribes' enforcement of planning, zoning and hazardous waste ordinances. May 16, 2014 Op., 8538-8539. The Judgment amount is the amount of a "special use permit fee for FMC's storage of

hazardous waste on the reservation pursuant to the LUPO." May 16, 2014 Op., 8539. In these circumstances, the penal judgment rule bars enforcement[14] of this type of penal judgment, because it was issued by a tribal court in favor of the governing body that appointed it.[15]

C. The Penal Judgment Rule Has Been Adopted in the Uniform Law.

The penal judgment rule is codified in the uniform law of most states.[16] This revised Uniform Law was adopted by Idaho in 2007. The Idaho version of this Uniform Law provides:

> (b) This [act] does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is: . . . (2) ***a fine or other penalty*** . . . .

IDAHO CODE § 10-1403(2) (2016); UNIFORM LAW § 3 (emphasis added). This law is based on the principle that: "Foreign-country judgments for taxes and judgments that constitute fines or penalties traditionally have not been recognized and enforced in U.S. courts." UNIFORM LAW, § 3, Cmt. 4. The National Conference also explained that "Courts generally hold that the test for whether a judgment is a fine or penalty is determined by whether its purpose is remedial in

[14] The penal law rule is consistent with the law of tribal jurisdiction established by the United States Supreme Court. The penal law rule would leave tribal courts ample authority to govern tribal members, while restricting the tribal courts ability to govern non-tribal members. The Supreme Court has explained that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders . . . ." *Plains Commerce*, 554 U.S. at 327, 328; *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978).

[15] The penal law rule is also consistent with the rule prohibiting criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) ; *Duro v. Reina*, 495 U.S. 676, 693 (1990) ("Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States.").

[16] National Conference of Commissioners on Uniform State Laws, Uniform Foreign-Country Money Judgments Recognition Act (July 21, 2005) ("Uniform Law"). The 2005 Uniform Foreign Country Money Judgments Recognition Act revised the 1962 act of the same name. These acts codify the most prevalent common law rules with respect to the recognition of money judgments rendered in other countries. Uniform Law, at 1. The 1965 version of the Uniform Foreign Money Judgments Recognition Act was also adopted by Idaho and followed essentially the same penal law prohibition against enforcing "a judgment for taxes, a fine or other penalty." IDAHO CODE § 10-1401(1) (2006).

nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice." UNIFORM LAW at 7.

D. The Penal Law Rule Also Prohibits Enforcement of Judgments Protected by the Full Faith and Credit Clause.

In *Wilson*, the Ninth Circuit determined that "[f]ull faith and credit is not extended to tribal judgments." 127 F.3d at 809. But even if tribal judgments were given full faith and credit, those judgments would still be prohibited by the penal law rule. *Huntington*, 146 U.S. at 657, 666, 667, 673-74; *see* U.S. CONST. art. IV § 1. In *Nelson v. George*, 399 U.S. 224 (1970), the Supreme Court recognized that the Full Faith and Credit Clause does not require that sister states enforce a foreign penal judgment: [17]

> Since ***the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment***, *Huntington v. Attrill*, 146 U.S. 657 (1892); *cf. Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 279 (1935), California is free to consider what effect, if any, it will give to the North Carolina detainer in terms of George's present "custody."

Nelson, 399 U.S. at 229 (emphasis added). In the case of *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 267 P.3d 48 (Nev. 2011), the Nevada Supreme Court determined that Nevada was not required to enforce a California civil judgment against a sign company for violation of a section Oakland's municipal sign code. The Nevada Supreme Court stated that "the United States Supreme Court has determined that the Full Faith and Credit Clause does not apply to penal judgments." *City of Oakland*, 267 P.3d at 51. Other states follow the same rule. *Philadelphia v. Austin*, 429 A.2d 568, 572 (N.J. 1981); *Schaefer v. H. B. Green Transp. Line*, 232 F.2d 415, 418 (7th Cir. 1956); *People v. Laino*, 32 Cal. 4th 878, 888, 87 P.3d 27 (Cal. 2004); *Farmers & Merchants Trust Co. v. Madeira*, 261 Cal. App. 2d 503, 508, 68 Cal.

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[17] A similar rule, the rule against recognition of tax judgments of sister states, has been overturned and is no longer in force. *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268 (1935); Restatement (Third) Foreign Relations Law, § 483 Note 1.

Rptr. 184, 188 (Ct. App. 1968); *S.H. v. Adm'r of Golden Valley Health Ctr.*, 386 N.W.2d 805, 807 (Minn. Ct. App. 1986); *MGM Desert Inn, Inc. v. Holz*, 411 S.E.2d 399, 402 (N.C. Ct. App. 1991); *Russo v. Dear*, 105 S.W.3d 43, 46 (Tex. App. 2003).

VII. ARTICLE III OF THE UNITED STATES CONSTITUTION BARS ENFORCEMENT OF THE TRIBAL COURT JUDGMENT AGAINST FMC.

The Judgment by the Appellate Court is fundamentally contrary to the U.S. Constitution. The Judgment asserts that power has been granted to one group of U.S. citizens to create a government and establish courts, and then use those courts to award sums against other U.S. citizens who are excluded from any participation in that government. This violates Article III of the Constitution, as pointed out in a question by Justice Sotomayor:

> Mr. Kneedler, some of my colleagues have been expressing a question that I am sure you haven't answered, which is ***how can, or how does the Constitution, particularly Article III, which gives every citizen the right to have their claims adjudicated before an Article III Court, how does Congress have the power to let – to place adjudicatory powers over a nonmember, non-Tribe member in a tribal court?***

Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, Oral Argument Transcript, 2015 WL 9919326, at 54-55 (Dec. 7, 2015); *see* Transcript at 35 (Justice Kennedy "I don't know what authority Congress has to subject citizens of the United States to that nonconstitutional forum."). The answer to this question is clear: neither Congress nor the courts have the authority to abrogate a citizen's right to Article III protection. In *Stern v. Marshall*, 564 U.S. 462 (2011), the Supreme Court explained that "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision making if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Id.* at 484.

Section 1 of Article III of the United States Constitution provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. The Judgment violates this prohibition, because the tribal courts were not "ordained and established" by Congress, and they are outside the direct authority of the Supreme Court. Section 2 of Article III provides that the federal judicial power extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority," and that the Supreme Court "shall have appellate Jurisdiction, both as to Law and Fact" over such cases. U.S. CONST. art. III § 2.

Article III contains two critical functions: First, it "protect[s] the role of the independent judiciary within the constitutional scheme of tripartite government," and second, it "assure[s] impartial adjudication in federal courts." *Thomas v. Union Carbide Agr. Prods. Co*., 473 U.S. 568, 582-83 (1985). "Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges." *Stern*, 564 U.S. at 483-84. This reflects the colonial experience, wherein "the King of Great Britain 'made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.'" *Id.,* quoting Decl. Ind. ¶ 11.

Although the tribes are allowed aspects of sovereignty as to the internal relations among their members, they are still subject to the overarching sovereignty of the United States and the Constitution. *United States v. Wheeler*, 435 U.S. 313, 326 (1978) ("implicit divestiture of sovereignty" over the "relations between an Indian tribe and nonmembers."). The Supremacy Clause provides that the Constitution and federal law shall be the supreme law of the land:

> ***This Constitution***, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

> Authority of the United States, ***shall be the supreme Law of the Land***; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI (emphasis added).

Article III does not permit the federal courts to authorize non-Article III courts and vest them with power over citizens of the United States. Under Article III, a claim that existed at common law or equity, or under the treaties of the United States, must be tried by an Article III court. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856); *Stern*, 564 U.S. 482; *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

The Supreme Court has allowed some tribunals outside of Article III, but only if a right at issue is expressly created by Congress and there are adequate due process guarantees. *Murray's Lessee*, 18 How. at 284 (1856); *Thomas*, 473 U.S. at 588; *see N. Pipeline Constr.*, 458 U.S. at 67-68; *Thomas*, 473 U.S. at 594; *Crowell*, 285 U.S. 22. Even where Congress has been allowed to assign adjudication to non-Article III agencies, it cannot deprive the Article III courts of jurisdiction over factual determinations related to constitutional rights. *Crowell*, 285 U.S. at 64. In determining whether the delegation outside of Article III is constitutional, courts consider key factors such as "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 852 (1986); *see Thomas*, 473 U.S. at 589-90, 592, 601; *Crowell*, 285 U.S. 22, 49–50. Under

these rules, giving authority to bankruptcy courts to adjudicate common law claims violated Article III, even if the decision was appealable to the district court. *Stern*, 564 U.S. at 492.[18]

There is no provision in the Constitution or in Congressional statutes giving tribal courts authority over non-Indians. Article III would prohibit Congress from making such a broad grant of judicial authority outside of Article III, even if it tried to do so. *See Schor*, 478 U.S. at 852. Even the adjudication of common law claims directly related to a bankruptcy petition is impermissible, despite the Constitutional grant of power to make bankruptcy law and the availability of direct appeal to an Article III court. *N. Pipeline*, 458 U.S. at 85, *Granfinanceria S.A. v. Nordberg*, 492 U.S. 33, 54-56, 109 S. Ct. 2782 (1989) (fraudulent conveyance claim), *Stern*, 564 U.S. at 492, 131 S. Ct. at 2614 (defamation counterclaim). The Constitution makes no provision for a parallel system of tribal courts. Neither Congress nor the judiciary can amend the Constitution to allow such a parallel system.

Even if the court-made doctrines authorizing tribal courts were Congressional acts, those acts would be barred by Article III. ***First***, Tribal courts are not established for purposes of impartial adjudication, but rather to further the interests of the Tribe. ***Second***, the Tribal Appellate Court was not isolated from political and legislative pressure. SOF 70-73, 78; *see Schor*, 478 U.S. 848 (Article III "was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision."); *see Stern*, 564 U.S. at 514-15 (disallowing authority in bankruptcy court, even though bankruptcy judges are only removable for cause). ***Third***, the merits of the Appellate Court's Judgment is not subject to review of either law or fact by the federal courts. *See Crowell*, 285 U.S. at 49-50; *Thomas*, 473 U.S. 568.

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[18] As with a bankruptcy court, the fact that the issue of Tribes' jurisdiction will ultimately be decided by Article III court does not cure the violation because the merits of the Tribal Appellate Court's decision are not reviewable by an Article III court.

Finally, giving adjudicatory authority over nonmembers to tribal courts is not necessary, and there is no reason to depart "from the requirements of Article III." *See Schor*, 478 U.S. at 852. As in *Montana*, the "exercise of tribal power *beyond what is necessary* to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544, 564 (1981). Enforcement of tribal law can be sought in other forums, either state or federal, without any loss of the power of self-governance. Bringing an action against nonmembers in either state or federal court would be more efficient, avoiding the necessity of bringing a second action to enforce a tribal court judgment. The jurisdiction of the tribal courts over nonmembers is unnecessary and inconsistent with both *Montana* and Article III. As such, the Judgment must be denied recognition.

VIII. CONCLUSION

The due process owed to U.S. citizens was not given to FMC by the Appellate Court. In addition, the Judgment issued by the Appellate Court is contrary to the penal law rule and violates Article III of the U.S. Constitution. This Court must refuse to recognize the Judgment.

DATED this 13th day of January, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of January, 2017, I filed the foregoing **MEMORANDUM OF FMC CORPORATION IN SUPPORT OF MOTION TO DENY ENFORCEMENT FOR FAILURE OF DUE PROCESS** electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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